

**Balan Subramaniam a/l Ponnudurai v Public Prosecutor and
another appeal**

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS
A-05-280 OF 2010 AND A-05-372 OF 2010
ZALEHA ZAHARI, CLEMENT SKINNER AND LINTON ALBERT
JJCA
27 JUNE 2013

*Evidence — Dying declaration — Admissibility — Whether dying declaration of
appellant's wife rightly admitted — Whether statement to police of daughter who
subsequently died should also have been admitted as dying declaration — Whether
medical evidence of both mother and daughter showed they were fit to make
statements — Whether both dying declarations corroborated each other to identify
appellant as perpetrator of crime*

The appellant was convicted and sentenced to death by the High Court for murdering his wife ('Angeladevi') by dousing her with petrol and setting her ablaze at their home. He was acquitted and discharged of murdering his daughter, Anuradha, and of attempting to murder another daughter, Malini, in the same manner at the same time and place. The appellant's instant appeal against conviction and sentence was met by the prosecution's cross-appeal against the acquittal and discharge on the two charges concerning his daughters. The appellant's neighbours testified during the trial that they rushed out of their homes on hearing screams and saw the appellant's house on fire. They saw Angeladevi and her daughters running out of the house, their bodies ablaze. They also saw one of the appellant's two cars speeding away from the scene but they were unable to say who the driver was. Malini, the less seriously injured of the three, managed to jump out of a window of a room she was trapped in. She sustained burns on both forearms and left thigh. Angeladevi and Anuradha, who were then in the living room, were seriously injured. Angeladevi sustained 90% burns on her body and died of shock at the hospital while Anuradha suffered 30% burns and died of septicaemia with multi-organ failure. Before her death, Angeladevi had allegedly told her attending doctor, PW21, that it was her husband who had set fire on her. Anuradha had also given a statement ('ID60') to the police that the appellant came home drunk, threatened to burn them and subsequently came into the living room with a jug of petrol and a lighted newspaper and threw the articles on them. The High Court admitted Angeladevi's dying declaration holding that the medical evidence showed she was able to speak; that there was no reason for PW21 to concoct the statement and that there was no apparent reason why Angeladevi would falsely accuse her husband. ID60 was not admitted as the trial judge ruled it was unsafe to do so as there was no medical evidence to establish that

A Anuradha was mentally fit when she made the statement. Malini's testimony in court contradicted her statement to police about the incident in material respects and the prosecution was allowed to impeach her credibility. At the end of that process, however, the trial court did not rule that her credit was impeached but that her evidence was unreliable and had to be treated with
B caution. In the instant appeal the appellant contended that the circumstantial evidence against him was weak; that Angeladevi's dying declaration should not have been admitted as there was no medical evidence of her state of mind given her grievous condition; and that the statement was raised by PW21 for the first
C time in court without any contemporaneous document to support the fact that it was made. The prosecution submitted that ID60 should have been admitted as it corroborated Angeladevi's dying declaration and the evidence of the appellant's neighbours.

D **Held**, dismissing the appeal and allowing the cross-appeal:

- (1) The direct and circumstantial evidence adduced by the prosecution clearly proved the appellant intended to cause bodily harm to Angeladevi and Anuradha by setting them ablaze and the intended bodily injury was sufficient in the ordinary course of nature to cause death. The dying
E declarations of Angeladevi and Anuradha pointed to the appellant, and only him, as the person who had poured petrol on both of them resulting in the fire to the house and causing their deaths. The prosecution had proved its case against the appellant for the murder of Angeladevi beyond reasonable doubt (see para 32).
F
- (2) As the facts of the three charges against the appellant were intertwined and intrinsically connected as to form part of the same transaction by reason of proximity of time, place, continuity of action and purpose, the trial judge erred in ruling the prosecution had not proved a prima facie case against the appellant for the murder of Anuradha and the attempted
G murder of Malini (see para 55).
- (3) Angeladevi's statement to PW21 was rightly admitted by the trial judge as a dying declaration under s 32(1)(a) of the Evidence Act 1950. The medical evidence showed that she was conscious, able to speak to the doctors who attended to her and was lucid enough to make the dying
H declaration. The court agreed that PW21 was an independent witness who had no reason to concoct such evidence (see para 39).
- (4) The trial judge erred in not admitting ID60. It should have been admitted as a dying declaration under s 32(1)(a) of the Evidence Act 1950 and marked as an exhibit as it related to the cause of Anuradha's death or circumstances of the transaction which resulted in her death. The medical evidence showed that Anuradha was fit to make the
I statement and there was no reason to doubt that the statements in ID60

were genuine and true. Anuradha's dying declaration clearly corroborated Angeladevi's dying declaration (see paras 49–51).

- (5) The direct evidence of the neighbours of a quarrel between the appellant and his wife and children just before the fire broke out was a relevant fact. The inferences made by the trial judge from the evidence of the neighbours was correct; that it was the appellant who sped off from the scene in the white car by reason of his not being seen at the vicinity of the fire (see para 52).
- (6) The trial judge erred in not impeaching Malini's credit as her testimony contradicted her s 112 of the Criminal Procedure Code statement in material particulars (see para 47).

[Bahasa Malaysia summary]

Perayu disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana membunuh isterinya ('Angeladevi') dengan menyimbah si mati dengan petrol dan membakar rumah mereka. Dia dilepaskan dan dibebaskan daripada pertuduhan membunuh anak perempuannya, Anuradha, dan atas percubaan untuk membunuh seorang lagi anak perempuannya, Malini, dengan cara yang sama pada masa dan tempat yang sama. Rayuan perayu ini terhadap sabitan dan hukuman ini ditentang oleh rayuan balas pihak pendakwaan terhadap pelepasan dan pembebasan bagi tuduhan berkenaan anak-anak perempuannya. Jiran-jiran perayu memberi keterangan ketika perbicaraan bahawa mereka bergegas keluar dari rumah masing-masing apabila mendengar jeritan dan melihat rumah perayu terbakar. Mereka melihat Angeladevi dan anak-anak perempuannya berlari keluar dari rumah mereka, dengan badan mereka terbakar. Mereka juga melihat salah satu daripada kereta perayu meluncur keluar dari tempat kejadian tetapi mereka tidak dapat mengagak siapa pemandunya. Malini, yang kurang kecederaan antara ketiga-ketiga mereka, berjaya keluar melalui tingkap bilik di mana dia terperangkap. Dia mengalami lecur pada kedua-dua bahagian lengan dan peha kiri. Angeladevi dan Anuradha, yang berada di dalam ruang tamu, cedera parah. Angeladevi mengalami 90% kelecuman pada badannya dan meninggal dunia secara mengejut di hospital manakala Anuradha mengalami 30% kelecuman dan meninggal dunia akibat *septicaemia* dan kegagalan pelbagai organ. Sebelum kematiannya, Angeladevi didakwa telah memberitahu doktor yang merawatnya, PW21, bahawa suaminya yang telah membakarnya. Anuradha juga memberikan kenyataan ('ID60') kepada pihak polis bahawa perayu pulang ke rumah dalam keadaan mabuk, mengugut untuk membakar mereka dan seterusnya masuk ke ruang tamu dengan satu teko berisi petrol dan suratkhbar yang terbakar dan mencampakkan keduanya ke atas mereka. Mahkamah Tinggi menerima akuan nazak Angeladevi, memutuskan bahawa keterangan perubatan menunjukkan bahawa dia boleh bercakap; bahawa tiada sebab untuk PW21 mereka kenyataan tersebut dan bahawa tiada alasan nyata mengapa Angeladevi menuduh suaminya dengan salah. ID60 tidak diterima

- A kerana hakim bicara memutuskan bahawa tidak selamat untuk berbuat demikian kerana tiada keterangan perubatan untuk membuktikan bahawa Anuradha berkeupayaan secara mental ketika membuat kenyataan tersebut. Keterangan Malini di mahkamah bercanggah dengan kenyataannya kepada pihak polis mengenai insiden tersebut berkenaan perkara-perkara material dan
- B pihak pendakwaan dibenarkan untuk mencabar kredibilitinya. Pada akhir proses, walau bagaimanapun, mahkamah perbicaraan tidak memutuskan bahawa kreditnya telah dicabar tetapi bahawa keterangannya tidak boleh dipercayai dan perlu ditimbang dengan berhati-hati. Dalam rayuan ini, perayu menghujahkan bahawa keterangan ikut keadaan terhadapnya adalah lemah;
- C bahawa akuan nazak Angeladevi tidak sepatutnya diterima kerana tiada keterangan perubatan mengenai keadaan mindanya, melihatkan pada keparahan keadaannya; dan bahawa kenyataannya dibangkitkan oleh PW21 buat kali pertamanya di mahkamah tanpa apa-apa dokumen semasa untuk menyokong fakta bahawa ia dibuat. Pihak pendakwaan menghujahkan
- D bahawa ID60 sepatutnya diterima kerana ia menyokong akuan nazak Angeladevi dan keterangan jiran-jiran perayu.

Diputuskan, menolak rayuan dan membenarkan rayuan balas:

- E (1) Keterangan langsung dan ikut keadaan yang dikemukakan oleh pihak pendakwaan dengan jelas membuktikan bahawa perayu berniat untuk menyebabkan kecederaan fizikal terhadap Angeladevi dan Anuradha dengan membakar mereka dan kecederaan fizikal yang diniatkan adalah mencukupi dalam perjalanan biasa kematian untuk menyebabkan kematian. Akuan nazak Angeladevi dan Anuradha mengarah kepada
- F perayu, dan hanya dia, sebagai orang yang mencurahkan petrol ke atas kedua mereka, menyebabkan kebakaran kepada rumah tersebut dan menyebabkan kematian mereka. Pihak pendakwaan telah membuktikan kes mereka terhadap perayu bagi kematian Angeladevi melampaui keraguan munasabah (lihat perenggan 32).
- G (2) Oleh kerana fakta ketiga-tiga pertuduhan saling berkaitan dan pada asasnya berhubung kait untuk membentuk satu transaksi dengan sebab kedekatan masa, tempat, kesinambungan tindakan dan tujuan, hakim perbicaraan khilaf dalam memutuskan bahawa pihak pendakwaan telah gagal membuktikan satu kes prima facie terhadap perayu bagi pembunuhan Anuradha dan percubaan membunuh Malini (lihat perenggan 55).
- H (3) Kenyataan Angeladevi telah dengan betul diterima oleh hakim perbicaraan sebagai akuan nazak di bawah s 32(1)(a) Akta Keterangan 1950. Keterangan perubatan menunjukkan bahawa dia sedar, mampu untuk bercakap dengan doktor-doktor yang merawatnya dan cukup sedar untuk membuat akuan nazak. Mahkamah bersetuju bahawa PW21
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adalah saksi bebas yang tidak mempunyai sebab untuk mereka keterangan sedemikian (lihat perenggan 39).

- (4) Hakim perbicaraan khilaf dalam tidak menerima ID60. Ia sepatutnya diterima sebagai deklarasi kematian di bawah s 32(1)(a) Akta Keterangan 1950 dan ditanda sebagai ekshibit kerana ia berkaitan dengan sebab kematian Anuradha atau hal keadaan transaksi yang menyebabkan kematiannya. Keterangan perubatan menunjukkan bahawa Anuradha berkeupayaan membuat kenyataan dan tiada sebab untuk meragui bahawa kenyataan-kenyataan dalam ID60 adalah asli dan benar. Akuan nazak Anuradha dengan jelas menyokong akuan nazak Angeladevi (lihat perenggan 49–51).
- (5) Keterangan langsung jiran-jiran mengenai pergaduhan antara perayu dan isteri dan anak-anaknya sebelum berlakunya kebakaran adalah fakta relevan. Inferens yang dibuat oleh hakim perbicaraan daripada keterangan jiran-jiran adalah betul; bahawa perayu adalah orang yang meluncur keluar dari tempat kejadian dalam kereta putih dengan sebab dia tidak dilihat dalam kawasan kebakaran (lihat perenggan 52).
- (6) Hakim perbicaraan khilaf dalam tidak mencabar kebolehpercayaan Malini kerana keterangannya bercanggah dengan kenyataan s 112 Kanun Tatacara Jenayah dalam butir-butir material (lihat perenggan 47).]

Notes

For cases on admissibility, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1582–1591.

Legislation referred to

Criminal Procedure Code s 112
Evidence Act 1950 s 32(1)(a)

Appeal from: Criminal Trial Nos 45–3 of 2005, 45–4 of 2005 and 45–5 of 2005 (High Court, Ipoh)

K Kumaraedran (Dev Kumar with him) (Kumar & Co) for the appellant.
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent/cross appellant.

Zaleha Zahari JCA (delivering judgment of the court):

[1] The reasons why the appellant's appeal was dismissed and the public prosecutor's cross-appeal was allowed in this case were as follows.

[2] Three charges had been preferred against the appellant ie attempted

A murder of his daughter, Malini a/p Balansubramaniam ('Malini') murder of his wife, Angeladevi a/p Raman ('Angeladevi'); murder of another daughter, Anuradha a/p Balansubramaniam ('Anuradha'). The charges are reproduced for ease of reference.

B (a)

Criminal Trial No 45-3 of 2005

C Bahawa kamu pada 11 Oktober 2004, di antara jam lebih kurang pukul 10.00 malam hingga 11.00 malam di sebuah rumah No 164, Desa Changkat (Indian Settlement), Batu Gajah, di dalam Daerah Kinta, di dalam Negeri Perak telah melakukan suatu perbuatan, iaitu menggunakan cecair kerosene bagi membakar, dengan niat dan dalam keadaan yang sedemikian bahawa jika, dengan perbuatan itu, kamu telah menyebabkan kematian Malini a/p Balansubramaniam, KPT No 811217-08-6482, kamu didapati bersalah melakukan kesalahan membunuh orang dan **D** bahawa kamu telah menyebabkan kecederaan kepada Malini a/p Balansubramaniam, dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 307 Kanun Keseksaan.

(b)

E Criminal Trial No 45-4 of 2005

Bahawa kamu pada 11 Oktober 2004, di antara jam lebih kurang pukul 10.00 malam hingga 11.00 malam di sebuah rumah No. 164, Desa Changkat (Indian Settlement), Batu Gajah, di dalam Daerah Kinta, di dalam Negeri Perak telah melakukan pembunuhan dengan menyebabkan kematian Angeladevi a/p Raman, KPT No 570226-08-5516 dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

F (c)

G Criminal Trial No 45-5 of 2005

Bahawa kamu pada 11 Oktober 2004, di antara jam lebih kurang pukul 10.00 malam hingga 11.00 malam di sebuah rumah No 164, Desa Changkat (Indian Settlement), Batu Gajah, di dalam Daerah Kinta, di dalam Negeri Perak telah melakukan pembunuhan dengan menyebabkan kematian Anuradha a/p Balansubramaniam, KPT No. 840724-08-5460 dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

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I [3] Based on the evidence adduced by the prosecution the learned trial judge's findings at the end of the prosecution's case was that the prosecution had failed to prove a prima facie case against the appellant in respect of the charge of attempted murder of Malini and murder of Anuradha. The appellant was acquitted and discharged in respect of these two charges.

[4] However, in respect of the charge of murder of Angeladevi, the learned trial judge held that the prosecution had proved a prima facie case against the appellant and called upon him to enter his defence. After hearing the defence to this charge, the learned trial judge held that the appellant had failed to raise a reasonable doubt in his favour, found him guilty, convicted him, then imposed the mandatory sentence of death upon him.

A

B

[5] The appellant's appeal against his conviction and sentence for murder of Angeladevi is the subject matter of Appeal No A-05-280 of 2010. The prosecution's cross-appeal in respect of the appellant's acquittal to the charge of attempted murder of Malini and murder of Anuradha is the subject matter of Criminal Appeal No A-05-372 of 2010.

C

[6] The determination of this appeal and cross-appeal essentially rests on the following issues: firstly, whether the learned trial judge was right in admitting the oral statement of Angeladevi to Dr Setow Hoo ('PW 21') as a dying declaration; secondly, whether the judge was right in not admitting Aduradha's s 112 of the CPC statement ('ID60') recorded by ASP Zahiri bin Hassan ('PW23') as evidence; lastly, whether the circumstantial evidence warranted the drawing of the inferences which the trial judge did?

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THE EVIDENCE

[7] The charges preferred against the appellant arose out of the same incident ie the outbreak of fire to a semi-permanent house situated at No 164, Desa Changkat (Indian Settlement) Batu Gajah, Kinta ('the said house'). The appellant and the victims named in the three charges, as well as the appellant's son, Krishnan a/l Balan Subramaniam ('PW16') lived in the said house. The evidence established that the appellant's son, Krishnan, was not at home on the date and time specified in the charge.

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[8] The fact that the said house was completely burnt down on the date and time specified in the three charges was not in issue. Mohamad Yamin bin Naib ('PW10'), the officer in charge of the Balai Bomba Penyelamat Batu Gajah, had carried out an investigation as to the cause of the fire to the said house arising from which Angeladevi and Anuradha (the persons named in the murder charges) and Malini (the person named in the attempted murder charge) had sustained the burn injuries as testified by the doctors who had attended to them. PW10's finding was that the cause of the fire was arson due to the burnt spots having the smell of combustible substance which however he could not identify.

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[9] Supt Abdul Aziz bin Abdul Majid ('PW12') and DSP Safani bin Mat Salleh ('PW17') also carried out an investigation as to the cause of the fire to the

- A said house. The source of the fire was traced to have started in the living room by reason of two burnt debris having traces of kerosene or petrol. The forensic team's conclusion was that the cause of the fire was due to fuel at the scene of the incident. According to the chemist, Kartigasu a/l Arumugam ('PW 7'), one of the burnt debris sent to him for analysis by ASP Ng Bo Huat ('PW9'), the investigation officer ('IO') in this case, was confirmed to have traces of petrol.
- B

- [10] It is not in issue that the persons named in the murder charges had died. Dr Mohamed Shafie bin Othman @ Osman ('PW24'), the forensic pathologist who performed the post-mortem on Angeladevi and Anuradha states that the cause of death of Angeladevi was shock due to 90% burns (exh 'P39'). PW24 was of the opinion that anyone suffering from 90% burns would in a normal situation be sufficient to cause death. As for Anuradha, the cause of her death was 'septisemia with multiorgans failure resulting from 30% burn injuries' (exh 'P40'). PW24 was of the view that septisemia with multi organs failure resulting from 30% burn injuries was sufficient in a normal situation to cause death.
- C
- D

- [11] As to who caused the outbreak of the fire to the said house due to arson by the use of petrol, arising from which the persons named in the charges suffered the burn injuries as described the doctors who had attended to them, leading to the death of two of them, the prosecution's case rests on direct evidence by way of the statements made by the two deceased persons, Angeladevi and Aduradha prior to their death, as well as circumstantial evidence by inferences to be drawn from the proved facts by the evidence of the neighbours.
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[12] I propose to deal with the circumstantial evidence first before dealing with the direct evidence.

- G *The neighbor's evidence*

- [13] A common thread ran through the evidence of the appellant's neighbors as to what happened that night, inter alia, Sinnapayen a/l Perumal ('PW2'), Hasmah bt Che Yin ('PW5'), Noraina Zainuddin ('PW6'), and Kartigesu a/l Arumugam ('PW7').
- H

- [14] Upon hearing either the sound of a quarrel or screams, the appellant's neighbours went out of their respective homes and saw the appellant's house on fire. The Fire Department was notified. The neighbors rendered whatever assistance they could to contain the fire. These witnesses testified to seeing a car, a white Toyota, being driven off at some speed, pass the front of the appellant's house towards the direction of the main road. None of them could however identify the driver of the white Toyota which speed off that night, but such a car
- I

was normally used by the appellant. Without exception, all of the neighbors testified that the appellant was nowhere to be seen to help put out the fire to his burning house that night. Angeladevi, Malini and Anuradha was seen by these neighbours coming out of their burning house, their bodies, ablaze.

A

The medical evidence

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[15] Angeladevi, Malini and Anuradha were initially sent to Batu Gajah Hospital, then to Ipoh General Hospital for treatment suffering from severe burn injuries as described by the doctors who had attended and treated them.

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(a) Angeladevi

[16] Dr Setow Hoo ('PW21') testified to having attended to Angeladevi on 11 October 2004. Her condition was serious. Angeladevi sustained 80% full thickness burns to her whole face, entire anterior aspect of her chest and to both her arms and lower limbs. She had difficulty in breathing but was conscious.

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[17] In his oral testimony in court PW21 testified that when he attended to Angeladevi she told him that her husband was the person who had set her on fire ('Beliau beritahu saya suami yang membakar dia'). PW21 made mention of such a statement being made to him by Angeladevi for the first time when he was giving evidence in court. This statement was not supported by any contemporaneous document.

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[18] The learned trial judge admitted Angeladevi's oral statement to PW21 as a dying declaration under s 32(1)(a) of the Evidence Act 1950 and gave due weight to this statement. This ruling was raised as a ground of appeal which will be dealt with subsequently in this judgment.

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(b) Anuradha

[19] Anuradha was attended by two doctors, Dr Setow Hoo (PW21) and Dr Lim Kwang Yang ('PW20'). PW21 attended to Anuradha on 12 October 2004 between 12 midnight to 1am. She sustained 30% mixed burns on her back and left upper limbs hand and was also in a serious condition upon admission.

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[20] PW21 agreed in cross-examination that given the fact that the burn injuries sustained by Anuradha and the treatment she was given, it would have been difficult but not impossible for Anuradha to give a statement to the police while she was in the burn unit. Anuradha would have been unconscious at any one time and drifting in and out of consciousness while medication were administered to her.

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A [21] PW20 testified to having administered Anuradha with pethidine to sedate her which could cause drowsiness in view of the condition she was in. PW20 could not say for certain whether the patient was able to fully and normally converse with anyone. Anuradha died on 25 October 2004.

B [22] To prove that the appellant was the person who poured petrol on his wife and daughter and setting them ablaze, the prosecution attempted to have ID60, Anuradha's statement recorded by ASP Zahiri bin Hassan ('PW23') under s 112 of the CPC admitted pursuant to s 32(1)(a) of the Evidence Act 1950 as an exhibit. ID60 was recorded on 12 October 2004 at 4am which took about 30–40 minutes to complete. Anuradha signed at the end of the statement, not every page. In ID60 Anuradha related what the appellant did and said, his threat to burn her and her mother, the lighting of a match, the burning of newspaper, then the pouring of petrol over her mother and her, resulting in the house being on fire, and her sustaining the serious burn injuries as described by the doctors arising from which she died. Exhibit ('ID60'), inter alia, states as follows:

- E 1. Pada 11.10.2004 lebih kurang pukul 7.00 petang semasa ini saya berada dirumah bersama kakak saya nama Malini dan emak saya nama Angeladavi. Semasa ini kami semua berada di ruang tamu dan bapa saya balik dalam keadaan mabuk, marah-marah dan bising-bising mengeluarkan kata-kata kotor seperti kamu bukan anak-anak saya tetapi anak-anak anjing.
- F 2. Lebih kurang pukul 8.00 malam 11.10.2004 bapa saya balik semula ke rumah dan terus ke dapur melihat makanan. Tidak lama selepas itu bapa saya datang kepada saya yang sedang menonton televisyen di ruang tamu dengan nada marah menyatakan kepada saya hendak bakar emak saya.
- G 3. Bapa saya berlalu sebentar dan apabila datang semula dalam masa, tidak sampai 2 minit saya nampak bapa saya ada memegang sehelai suratkhabar yang telah terbakar dan membuangnya di hujung kepala saya. Bapa saya juga sebenarnya semasa ini telah membawa satu jug alunimiun saya syaki minyak petrol berdasarkan baunya dan terus mencurahkan ke atas badan emak saya menyebabkan api daripada suratkhabar yang menyala tadi menyambar dengan cepat muka, bahu, tangan dan kaki saya. Manakala emak saya pula api menyambar seluruh badannya. Saya bersama emak saya terus berlari keluar rumah dan diikuti oleh kakak saya juga dalam keadaan api membakar boleh dikatakan seluruh badannya. Jiran saya kemudiannya menghantar saya ke hospital Batu Gajah mankala emak dan kakak saya juga dihantar ke hospital Batu Gajah oleh jiran tetapi secara berasingan. Setelah itu kami dipindahkan unit rawatan lanjut ke Hospital Besar Ipoh.
- I 3. Setelah membakar kami bertiga beliau terus keluar dengan motokarnya. Saya sendiri tidak tahu dimana beliau pergi atau berada sekarang.

[23] The learned trial judge ruled that it was unsafe to admit ID60 as an exhibit by reason of the absence of medical evidence confirming that Anuradha was in a fit condition to make such a statement. This ruling was the subject matter of the prosecution's cross-appeal and will be dealt with subsequently in this judgment.

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(c) Malini

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[24] PW21 also testified to having attended to Malini that same day, 12 October 2004, at about 2.03am. Malini sustained burn injuries on her left and right forearm as well as left thigh. Malini was referred to PW20 that same day at about 9am.

C

[25] The prosecution had called Malini ('PW15') to relate the events that night leading to the outbreak of the fire to the said house. Malini oral's testimony in court was neutral, she had her dinner then went to sleep. That nothing of any significance occurred between her father, mother nor her sister, Anuradha, that night. She was awakened by the screams of her mother and sister, to seeing them ablaze, their living room on fire. She related her initial attempts to escape were futile. She was trapped in the burning house. She only managed to save herself by jumping out of a window which someone had managed to break open at the room where she was trapped in.

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[26] Malini's oral testimony in court contradicted her statement recorded under s 112 of the Criminal Procedure Code ('CPC') in material particulars (exh P54), in which statement she had related in great detail as to events and the conduct of the appellant and the cause of fire that had razed her home that night. The record shows that the trial judge had allowed the prosecution to institute impeachment proceedings against Malini by reason of the major inconsistencies highlighted by the prosecution. At the conclusion of the impeachment proceedings the trial judge's finding was that Malini's explanation were not acceptable. Subsequently, taking into consideration the evidence of Dr Setow Hoo ('PW21'), the learned judge's finding was that Malini might not have been fully aware of herself during or while her statement was being recorded. The judge then ruled that Malini's credit was not impeached but her evidence was unreliable and must be treated with caution.

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[27] This ruling of the High Court was the subject matter of the cross-appeal by the prosecution and will be dealt with subsequently in this judgment.

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The High Court judge's decision

[28] The learned trial judge in his judgment made the following finding of facts and inferences from the facts proven:

- A 13.2.4 A very strong inference could be drawn from the evidence of the neighbours PW5–PW7 that it was the accused who drove his white Toyota KE and sped off from the front of his house which was then on fire to the main road although none of the witnesses actually saw who the driver was. Such a strong inference was drawn from the following evidence:
- B (i) PW7 told the court that the accused had two cars: one was a white Toyota KE and the other was the white Nissan. The white Toyota KE was driven by the accused and sometimes by his son Krishnan (PW16). The possibility of his son driving the Toyota KE on the night in question could be easily ruled out because on the night in question, the son was in Kuala Lumpur. The other car was a white Nissan driven by Malini (PW15).
- C (ii) PW5 told the court when she and her husband came out of her house after hearing noises as if people were screaming she saw the accused's house on fire and a white Toyota with registration number CK6489 passing the front of the accused's house being driven at a speed towards the road. She knew that the said white Toyota was usually used by the accused although she did not see who the driver was in the night in question. PW5's evidence was supported by PW6's evidence that on the night in question when she heard some noises outside her house, she opened her house window and heard someone starting his car for a long time and the car sped off from the house ...
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- E

- [29] The trial judge carefully considered the objection raised by the defence to the admission of Angeladevi's oral statement to Dr Setow Hoo ('PW21') that the appellant was the person who had burnt her as a dying declaration under s 32(1)(a) of the Evidence Act 1950. The defence relied on the fact that Angeladevi's oral statement had not been recorded in any medical report; the fact that PW21 did not lodge a police report or give a statement to the police of such an oral statement being made to him; the fact that it was raised for the first time in court; the exact words uttered by Angeladevi were not before the court; the probability that Angeladevi was not making a conscious and voluntary statement given the medical condition she was then in.
- F
- G

- [30] The learned trial judge then ruled that the oral statement of Angeladevi to Dr Setow Hoo, 'Beliau beritahu saya suami yang membakar dia', was admissible under s 32(1)(a) of the Evidence Act 1950. The judge was satisfied that although Angeladevi's condition upon admission to hospital was serious as testified by the doctors who had attended to her, he was satisfied based on the medical evidence before him that Angeladevi was conscious and able to speak.
- H He ruled that the exact words uttered by Angeladevi were before the court. The words uttered by Angeladevi identified the person who caused the fire arising from which she sustained the 90% burnt injuries arising from which she subsequently died. The judge accepted Dr Setow Hoo as an independent witness, that his testimony was free from falsehood and concoction and there
- I

was no reason to disbelieve him. Further, there was no possible reason for Angeladevi to falsely accuse her own husband, the appellant.

A

[31] In respect of Anuradha's written statement ('ID60'), the judge ruled that the recording officer PW23 had complied with the requirements of s 112 of the CPC, to having administered the caution, then recording the statement in a language understood by Anuradha; that the statement had been duly read back to her and she was given an opportunity to make any corrections, and the statement had been duly signed by her. Be that as it may, he ruled that it was unsafe for ID60 to be admitted in evidence as there was no medical certificate issued by the attending doctors stating that Anuradha was in a fit mental state to give such a statement.

B

C

[32] With the admission of the oral dying declaration of Angeladevi, and considering it together with the other circumstantial evidence before him, and subjecting them to the maximum evaluation test, the judge's finding was that it was the appellant who had poured petrol on Angeladevi and set her ablaze and had caused the extensive burn injuries to her arising from which she died. He then made a finding that the prosecution had proved that the death of Angeladevi was caused by the appellant. However, as regards Anuradha, his finding was that, with the exclusion of Anuradha's statement made under s 112 of the CPC as a dying declaration, there was insufficient evidence to prove that her death was caused by the appellant. Similarly, with regard to Malini, he made a finding that there was also insufficient evidence to prove that it was the appellant who caused the burn injuries sustained by Malini.

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[33] In considering the appellant's defence to the murder of Angeladevi, the learned trial judge's finding was that they were but a series of denials; denial of quarrelling with his wife, denial of pouring 'kerosene' on his wife and daughters, to lighting newspapers and throwing the lighted newspaper to them, as well as denial of driving off in his car after setting them ablaze. He then found the appellant guilty, convicted him then sentenced him as stated earlier on in this judgment.

G

The appellant's counsel's submissions

H

[34] The appellant's counsel submitted that the circumstantial evidence was weak. The evidence of the neighbours, PW2, PW4 and PW5, testified to seeing a white Toyota being driven off at a speed pass by the appellant's house, but according to counsel none of them could positively identify who was then driving the said car.

I

[35] On the prosecution's attempt to adduce direct evidence as to the cause

A of the fire through Malini ('PW15') who has been subjected to impeachment proceedings, counsel submitted that the judge erred in not impeaching Malini's credit.

B [36] As for Angeladevi's oral statement to PW21 that her husband (ie the appellant) was the person who caused her to be on fire which was relied on by the prosecution as an oral dying declaration, he submitted that the judge erred in admitting Angeladevi's oral statement to PW21 as a dying declaration. There was no evidence as to Angeladevi's state of mind when she allegedly made this statements to PW21. According to counsel for the appellant the prosecution has to prove that a person who had sustained 90% burnt injuries and gasping for breath, was in a position to make such an oral statement. In the absence of some positive evidence that Angeladevi was mentally fit to make the oral statement, of which he submitted there was none, it was his submission that the court erred in making the ruling which it did as Angeladevi could not have been lucid at the time when that statement was made. Counsel further submitted that such an oral statement should also not be accepted as it was not supported by any contemporaneous document. PW21 had not lodged a police report or give a statement to the police regarding this oral declaration. It should not have been accepted as the exact words uttered by Angeladevi had not been recorded.

E [37] The appellant's counsel submitted the learned JC was right in not admitting Anuradha's s 112 of the CPC statement ('ID60') as evidence for the reasons given by him, and there was no medical evidence to support that she was fit to make such a statement.

The deputy public prosecutor's submissions

G [38] On Malini's testimony, he submitted that Malini's credit should have impeached by reason of the major inconsistencies highlighted in the impeachment proceedings.

H [39] On the admission of Angeladevi's oral statement to PW21 as a dying declaration, he submitted that the trial judge was right in admitting Angeladevi's oral statement to PW21 as a dying declaration. Angeladevi made the oral to PW21 soon after her admission to the hospital. PW21, a professional, was a credible witness. PW21 personally heard Angeladevi's statement. There was no reason for PW21 to concoct such evidence.

I [40] As for Anuradha's statement ID60, it must necessarily be considered at the admissibility stage, then, weighed. In this case the trial judge was satisfied that requirements of s 112 of the CPC had been complied with. PW23 had recorded Anuradha's statement verbatim. Anuradha's statement corroborated

the oral dying declaration of her mother Angeladevi, that the appellant was the person who had set her on fire, as well as the evidence of the neighbours. These evidence when considered as a whole lend credence to Anuradha's statement.

A

[41] The DPP submitted that on the facts of this case the person who poured petrol on Angeladevi must be the same person who committed the same act to Anuradha, resulting in her death and seriously injuring Malini.

B

DECISION

[42] The cause of the fire to the said house has been confirmed to be arson by the use of petrol.

C

[43] It has been proved as a fact that the persons named in the murder charges had died from the burn injuries suffered by them when their home, the said house, was gutted and razed to the ground by the outbreak of fire that night.

D

[44] It has also been proved as a fact that the person named in the attempted murder charge had sustained burn injuries. Having been trapped in her burning house, Malini was lucky to have escaped the inferno due to the quick action of one of the neighbors breaking open a window of the room she was trapped in. Malini, fortunately, did not succumb to the burn injuries sustained by her.

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[45] The critical questions to be answered are: has the prosecution proved that the appellant was the person responsible for the outbreak of the fire to the said house that night? If the answer to this question was 'Yes', whether it was committed with the intention to inflict bodily injury to the persons named in the murder charges and attempted murder charge? If the appellant was the person who was the cause of the fire, was it accidental or unintentional? Has it been proved that the injuries sustained by the named victims was sufficient to cause death in the ordinary course of nature?

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H

[46] On these issues the best evidence would certainly be that of the victim themselves, by way of direct evidence ie the oral dying declaration of Angeladevi and written dying declaration of Anuradha.

[47] As for Malini's evidence we take the view that the trial judge erred in not impeaching Malini's credit as her testimony in court contradicted her s 112 of the CPC statement in material particulars.

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[48] In our considered opinion the statement made by Angeladevi to PW21

A was rightly admitted by the trial judge as a dying declaration under s 32(1)(a) of the Evidence Act 1950. The medical evidence shows that Angeladevi, despite sustaining the severe burn injuries which she did, was conscious, able to speak to the doctors who had attended to her and lucid enough to make the dying declaration which she did. We are in agreement with the learned trial judge that
B PW21 was an independent witness who had no reason to concoct such evidence. What Angeladevi told PW21, that her husband (ie the appellant) was the person who had set her on fire, was certainly material evidence as it relates to the circumstances how she sustained the burn injuries which she did, arising from which she subsequently died.

C
[49] In respect of the non-admission of Anuradha's statement ('ID60') recorded by PW23 as evidence, we are of the view that the trial judge had erred in doing so. We are of the view that ID60 should have been admitted as a dying declaration under s 32(1)(a) of the Evidence Act 1950 and marked as an exhibit
D as it relates to the cause of Anuradha's death or circumstances of the transaction which resulted in her death.

E
[50] We are not in agreement with the judge's ruling that there was no positive evidence to show that Anuradha was fit to make the statement which she did. On the contrary, we take the view that the medical evidence shows that, despite the seriousness of her burn injuries, Anuradha was fit to make the statement which she did. The recording officer ('PW23') had faithfully and truly recorded Anuradha's statement, which statement was clearly relevant
F evidence as it relates to the circumstances leading to Anuradha's injuries which led to her death. The only issue being, what weight was to be accorded to it?

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[51] In the circumstances of this case we take the view that there was no reason for us to doubt that the statements contained in ID60 to be genuine and true, that nothing can detract from its value. The dying declaration of Anuradha clearly corroborates the dying declaration of Angeladevi which has been rightly admitted by the trial judge.

H
[52] The direct evidence of the neighbours of a quarrel between the appellant and his wife and children just before the fire broke out was certainly also a relevant fact. We agree with the inferences made by the learned judge from the evidence of the neighbours, that it was the appellant who drove the white car that sped off from the front of the said house to the main road by reason of the appellant not being seen in the vicinity of the said house which
I was then on fire.

[53] The direct and circumstantial evidence adduced by the prosecution clearly proved that the appellant had the intention of causing bodily harm to the Angeladevi and Anuradha by setting them ablaze and the bodily injury

intended to be inflicted upon them was sufficient in the ordinary course of nature to cause death. The dying declarations of Angeladevi and Anuradha point to the appellant, and only him, being the person who had poured petrol on both of them, resulting in the outbreak of the fire to the said house that night, causing the death of his wife, Angeladevi, and daughter, Anuradha. His daughter Malini was lucky to survive due to the quick action of his neighbours and medical treatment given.

CONCLUSION

[54] For the above reasons we find that the prosecution had proved its case for the murder of Angeladevi beyond reasonable doubt. The appellant's appeal against his conviction and sentence for the murder of Angeladevi and sentence imposed upon him by the High Court was accordingly dismissed.

[55] In respect of the public prosecutor's cross-appeal against the acquittal of the appellant in respect of the charge of attempted murder of his daughter Malini and murder of his daughter Anuradha, as the facts of the three charges preferred against the appellant were intertwined and intrinsically connected as to form a part of the same transaction by reason of proximity of time, place, continuity of action and purpose, it is our finding that the learned judge had erred in ruling that the prosecution had not proved a prima facie case against him for the attempted murder of Malini and murder of Anuradha. The public prosecutor's cross-appeal against this decision was allowed and accordingly set aside. These cases were remitted back to High Court Ipoh for the appellant to enter his defence in respect of these two charges.

Appeal dismissed and cross-appeal allowed

Reported by Ashok Kumar

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